

**United States Department of Labor
Employees' Compensation Appeals Board**

H.W., Appellant

and

**DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD,
Charleston, SC, Employer**

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**Docket No. 06-1474
Issued: October 17, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2006 appellant filed a timely appeal from a May 12, 2006 Office of Workers' Compensation Programs' nonmerit decision denying his request for reconsideration. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ The Board has no jurisdiction to consider the Office's last merit decision dated March 12, 1992, denying appellant's claim for compensation benefits after June 25, 1979. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 12, 2006 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

FACTUAL HISTORY

This case was previously before the Board. By decision dated November 5, 1997, the Board affirmed an April 18, 1995 Office decision that denied appellant's request for reconsideration of a March 12, 1992 decision which denied his claim for disability after June 25, 1979.² The November 5, 1997 Board decision is incorporated herein by reference.

On April 6, 2006 appellant requested reconsideration and submitted additional evidence. In a December 6, 2005 report, Dr. Robert Anderson diagnosed herniated discs of the lumbar spine, as shown on a June 4, 2003 magnetic resonance imaging (MRI) scan. He indicated that this condition was much more likely to have been caused by appellant's 1979 employment injury than his military service-related low back injury³ or a 1967 motor vehicle accident which resulted in lumbar vertebral fractures. Dr. Anderson indicated that appellant's back pain worsened during the 1990's. The June 4, 2003 MRI scan report indicated herniated discs at L4-5 and L5-S1.

By decision dated May 12, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.⁴

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year time

² Docket No. 95-3024 (issued November 5, 1997). Appellant submitted a claim for compensation benefits for a June 13, 1979 injury to his low back. The Office accepted his claim for a lumbosacral strain and paid appropriate compensation benefits. However, the Office determined that appellant had no employment-related disability after June 25, 1979. By decision dated March 12, 1992, the Office denied modification of its prior decision.

³ Appellant sustained injuries to his low back, left leg, left arm and neck caused by an explosive device when he served in Vietnam.

⁴ Appellant submitted additional evidence subsequent to the Office decision of May 12, 2006. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁵ 5 U.S.C. § 8128(a).

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁷ *Id.* at 768.

⁸ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁵ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

The merits of appellant's case are not before the Board. As noted, the last Office merit decision in this case was issued March 12, 1992. His most recent request for reconsideration was dated April 6, 2006. As this request was filed more than one year after the March 12, 1992 merit decision, it is not timely.¹⁷ The remaining issue is whether appellant demonstrated clear evidence of error in the March 12, 1992 Office merit decision.

⁹ *Thankamma Mathews*, *supra* note 6 at 769.

¹⁰ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Darletha Coleman*, *supra* note 13.

¹⁶ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

On December 6, 2005 Dr. Anderson diagnosed herniated discs of the lumbar spine, as shown on a June 4, 2003 MRI scan and indicated that this condition was caused by appellant's 1979 employment injury. The June 4, 2003 MRI scan report indicated that appellant had herniated discs at L4-5 and L5-S1. However, a herniated disc is not an accepted condition in this case. The finding of herniated discs on a 2003 MRI scan does not constitute clear evidence of error in the Office's determination that appellant had no disability after June 25, 1979 causally related to his June 13, 1979 lumbosacral strain. Dr. Anderson opined that appellant's herniated discs were caused by the 1979 employment-related lumbar strain. However, he provided little rationale for his opinion, considering that the herniated discs were diagnosed 24 years after appellant's 1979 employment-related lumbar strain. Dr. Anderson's 2005 report and the 2003 MRI scan report do not show clear evidence of error in the Office's March 12, 1992 determination that appellant had no residuals of his June 13, 1979 accepted lumbar strain after June 25, 1979. As appellant failed to submit clear evidence of error, the Office properly denied his request for further merit review in its May 12, 2006 decision.

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2006 is affirmed.

Issued: October 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board